Supreme Court, U.S.
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No. 02 145

In The
Supreme Court of the United States

GORDON PAUL COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER S. HANSON, ESQ.
1517 East 4th Street
Santa Ana, California 92701
(714) 953-0638

Attorney for Petitioner
Member of the Bar
Supreme Court of the United States

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether *Slack v. McDaniel,* 529 U.S. 473, 483 III (2000) requires a United States Circuit Court panel to examine the appellant's briefs on the merits to determine whether "a substantial showing of the denial of additional constitutional rights" are set forth in that brief on the merits, where a District Court has issued a Certificate of Appealability limiting the issues on appeal, and where the appellant does fully brief all issues that were denied in the COA that was granted partially?

2. Whether the U.S. Ninth Circuit can avoid the commands of *Slack v. McDaniel,* 529 U.S. 473, 483 III (2000) for resolution of all issues by the 3 judge merits panel by requiring the appellant to seek an augmented Certificate of Appealability before a "Motions Panel" (2 judges), and if that augmentation of the COA is not granted, preclude the appellant from having the 3 judge merits panel examine the briefs on the merits to determine if a "substantial showing of the denial of additional constitutional rights" is shown in the merits brief?

3. Whether a conflict exists in the United States Circuit Courts as to a requirement of an appellant to file a separate motion to augment a COA granted as to partial issues under 28 U.S.C. 2253(c), requiring this court to settle that conflict in the Circuits?

4. Whether *Slack v. McDaniel,* 529 U.S. 473, 483 III (2000), followed by the Ninth Circuit opinion *Solis v. Garcia,* 219 F.3d 922, 926 (9th Cir. 2000) establishes error in this Ninth Circuit Court panel refusing to examine the briefs on the merits to determine if the petitioner had established additional "substantial showing of the denial of constitutional rights"?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Gordon Paul Cooper, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from the memorandum filed March 11, 2002, rehearing and suggestion for rehearing en banc denied May 1, 2002.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its unpublished *Memorandum* on March 11, 2002. This appears as Appendix A to this petition.

On May 1, 2002, the U.S. Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc. A copy of that order appears as Appendix B to this petition.

JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the Ninth Circuit affirmed denial of petitioners 28 U.S.C. 2255 petition by an unpublished *Memorandum* filed March 11, 2002. A copy of that *Memorandum* appears at Appendix A.

(ii) The U.S. Ninth Circuit denied a petition for Rehearing/Suggestion for Rehearing En Banc on May 1, 2002. A copy of that Order appears at Appendix D.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE SECTIONS INVOLVED

28 U.S.C. 2253(c):

Effective April 24, 1996, AEDPA amended 2253. As relevant here, AEDPA added subsection (c), which provides:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. § 2253(c) (1994 ed., Supp. III).

UNITED STATES COURT OF APPEALS NINTH CIRCUIT RULE 22-1(d)

If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. *Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issue(s) within thirty-five days of the district court's entry of its order* denying a certificate of appealabilty.

STATEMENT OF THE CASE

Petitioner, a professional hauler of sewage sludge, was convicted of two general federal crimes: the illegal dumping of sewage sludge on private farmland in Imperial County, California (although newly enacted federal law at 40 C.F.R. 503 did not make this a crime) and the mailing, via U.S. Mails, of allegedly false "weigh slips" generated

from weighing loads of sludge to ascertain the amount of sludge. The government's case on the latter crime was presented virtually 100% by one Manuel Mier, the person that petitioner had contracted with to provide the trucks, load the trucks with sewage sludge and determine the weight of the sludge, and then dump it. Petitioner denied under oath any role in the second set of crimes. The government gave full immunities to Manuel Mier for several federal crimes committed by Mier including lying to an F.B.I. agent (18 U.S.C. 1001); lying before the Federal Grand Jury; lying at trial; and his admitted role in not weighing the trucks, but filling out false weigh slips falsely showing that the trucks had been weighed. Mier denied under oath that he had been given full immunity for these 4 federal crimes and the assistant U.S. attorney representing the government at trial willfully failed to correct this false testimony. This violated the mandates of *Giglio v. United States*, 405 U.S. 150 (1972) and *De Marco v. United States*, 415 U.S. 449, 450 (1974), the latter requiring reversal of the conviction of a criminal defendant where the government allowed such false evidence of the "deal" to go before the jury:

> Unquestionably, had there been a promise to the witness prior to his testimony, *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972) and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed. 2d 1217 (1959) would require reversal of petitioner's conviction.

The known use of perjury by a federal prosecutor violates the long-standing rule of *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *United States v. Agurs*, 427 U.S. 97, 103 (1976), this principle recently, once again, being

recognized, as it must, by a panel of the U.S. Ninth Circuit in *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002):

> "The knowing use of perjured testimony by a prosecutor generally requires that the conviction be set aside. See *United States v. Agurs*, 427 U.S. 97, 103 (1976) (conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury . . .)"

Importantly, unlike the instant case, the Killian-Poole 3 Judge panel of the Ninth Circuit was reviewing the evidence established at an evidentiary hearing, and asserted its task to be:

> We must decide whether the use of perjured testimony, the withholding of evidence that would help show the falsity of the testimony, and the reliance on the perjury by the prosecutor in final argument, alone or in combination, justifies habeas relief. (282 F.3d 1204, 1206) (9th Cir. 2002)

At bar, the sought evidentiary hearing in the 28 U.S.C. 2255 petition was denied, and while that denial was raised as an issue in the Certificate of Appealability sought by the petitioner, the U.S. District Court refused to include it as an issue on the appeal.

The 28 U.S.C. 2255 petition was sought, including the seeking of the evidentiary hearing, because post conviction research in Mexico provided unassailable evidence that government witness Manuel Mier had lied in significant areas to the jury, and the assistant U.S. attorney prosecuting petitioner Cooper was fully aware of the lies, and made no effort to change these lies. In addition, unassailable evidence had been uncovered that the government had

given full immunity to Mier, before he testified, and had willfully concealed this from the defense team, with knowledge of, and cooperation of, the Federal Bureau of Investigation. Extensive sworn depositions and uncovering of F.B.I. reports suppressed from the defense would have also proven that perjury at an evidentiary hearing.

On January 1, 1999, the U.S. Ninth Circuit adopted a local rule not contained in 28 U.S.C. 2253(c), or provided by this Court; that Court addressed this rule in its case *United States v. Zuno-Arce*, 209 F.3d 1095, 1100 (9th Cir. 2000) decided April 19, 2000.

However, seven days later this Honorable Court decided *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), on April 26, 2000. Of key importance, the Slack majority required that a Court of Appeals panel examine and treat even a Notice of Appeal as an application for a COA, and surely must examine the briefs presented to the Court of Appeals raising other denials of constitutional rights if a COA has been granted for any issue, and this must be done by a merits panel.

Following *Slack*, another panel of the Ninth Circuit soon decided *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000) on July 12, 2000. Importantly the *Solis* decision specifically no longer followed the short-lived position in *Zuno-Arce*; *Solis* did not require, where a COA had been partially granted, the petitioner to file a "motion" before a separate 2 judge "motions panel" to seek augmentation of the issues that were allocated in the truncated COA.

The 3 judge merits panel in *Solis* (C. J.'s Judges Browning, Tashima, D.J. Jones), citing *Slack*, ruled:

> Consistent with *Slack*, we treat petitioner's brief on uncertified issues in this appeal as a request to expand the COA issued by the district court .... We conclude that petitioner has made the requisite substantial showing of the denial of a constitutional right, 28 U.S.C. 2253(c)(2), with respect to all issues briefed to this Court. We therefore grant the expanded COA and exercise jurisdiction over these issues on appeal.

Petitioner therefore did not file a "motion" before a 2-judge motions panel, but indeed filed his opening brief asserting all denials of constitutional rights, including the key failure to grant the evidentiary hearing where government perjury would have been established, as well as the grant of immunity to key government witness Mier before he testified.

The Ninth Circuit, in a brief unpublished memorandum, denied the 28 U.S.C. 2255 petition because its local rule, obliterated by *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) and its later published panel decision *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000), was resuscitated for this case alone.

The U.S. First and Third Circuits have a similar rule but none of the other 9 Circuits have such a rule, nor is such a rule provided in 28 U.S.C. 2253(c), nor in this Honorable Court's decision in *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

At issue is the constitutionality of such a rule, and the recognition that a gross conflict exists in the U.S. Circuit Courts, where that rule is not provided by Congress in 28 U.S.C. 2253(c), nor by this Honorable Court.

Certiorari should therefore be granted to the U.S. Court of Appeals for the Ninth Circuit to evaluate the constitutionality of such a rule, and to provide uniformity throughout the entire twelve United States Circuit Courts.

REASONS FOR GRANTING PETITION FOR CERTIORARI

1. To resolve whether Ninth Circuit Rule 22-1(d) violates the mandate of *Slack v. McDaniel*, 529 U.S. 473, 483 III (2000) where it avoids a full examination by a Merits Panel of the opening brief of a criminal appellant setting forth denials of constitutional rights which were not allowed in a COA granted for a limited purpose.

2. To resolve a conflict in the U.S. Circuit Courts between the 1st, 3rd and 9th Circuits, who have such a limiting rule, and the other 9 Circuits who do not, said rule providing an obstacle to relief in appeals in criminal cases by requiring a "Motions Panel" to decide whether a truncated COA shall be augmented, and denying appeal unless a "Motions Panel" allows an augmentation of the disallowed issues.

3. To provide further needed guidance to appellants seeking a COA, and the rules needed to seek an expanded COA, providing one uniform rule in all 12 Circuits.

ARGUMENT I

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MERITS PANEL ERRED IN THIS CASE IN REFUSING TO EXAMINE THE BRIEFS ON THE MERITS TO ASCERTAIN WHETHER A "SUBSTANTIAL SHOWING HAD BEEN MADE OF ADDITIONAL DENIALS OF CONSTITUTIONAL RIGHTS," WHERE A COA HAD BEEN GRANTED FOR "ONE ISSUE," AND THE BRIEFS ON THE MERITS DEMONSTRATED THE EXISTENCE OF ADDITIONAL DENIALS OF CONSTITUTIONAL RIGHTS.

The 28 U.S.C. 2255 petition filed on behalf of petitioner Cooper sought, inter alia, a key evidentiary hearing in the U.S. District Court for the Southern District of California to prove 2 key denials of due process of law in petitioner's conviction, and subsequent appeal to the Ninth Circuit resulting in the decision *United States v. Cooper*, 173 F.3d 1192 (9th Cir. 1999).

That evidentiary hearing was expected to establish:

1. That a key government witness, one Manuel Mier, committed perjury with the aid and knowledge of the assistant U.S. attorney prosecuting the case, said key perjury being used to convict petitioner, and

2. that the government had granted full immunity to its witness, Manuel Mier, for several known federal crimes, and had suppressed that immunity from the defense, and had allowed Mier to perjuriously deny before the jury that said immunity had been given, express denials of due process of law within the

> meaning of *Giglio v. United States*, 405 U.S. 150 (1972) and *De Marco v. United States*, 415 U.S. 449 (1974).

These contentions were made in the direct appeal and were responded to in the published panel decision *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999) as follows:

> C. Immunity Agreement
>
> (17) Cooper contends that the government improperly failed to disclose an immunity agreement with Mier. The government denies that it had an agreement with Mier.
>
> (18) This court reviews de novo alleged violations of the government's obligation to disclose leniency agreements with prosecution witnesses. *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995); see *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972).
>
> As the defense established at trial, Mier's credibility was shaky at best. He faced potential criminal prosecution in the United States, so it seems unlikely that he would return to testify only because he wanted to tell the truth. This, however, is at most circumstantial evidence of an immunity agreement with Mier. A defendant must present more direct evidence of an agreement to justify reversal on this ground. See *United States v. Ramirez*, 608 F.2d 1261, 1266-67 (9th Cir. 1979).

In *United States v. Ramirez*, 608 F.2d 1261, 1267 (9th Cir. 1979), a panel of the Ninth Circuit ruled:

> "Even if a prior plea bargain has not been clearly established where there is a substantive claim

> that an undisclosed plea bargain had been reached, *DeMarco v. United States*, 415 U.S. 449, 450, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974), ***REQUIRES REMANDING*** to the district court to conduct an evidentiary hearing in order to determine whether a plea bargain was reached prior to the witness's giving of his testimony. *United States v. Piet*, 498 F.2d 178, 182 (7th Cir. 1974), cert.den. 419 U.S. 1069, 95 S.Ct. 155, 42 L.Ed.2d 664 (1974)."

In view of the foregoing Ninth Circuit assertion that the trial record was inadequate to establish the *Giglio-De Marco* denial of due process of law in suppressing the deal, petitioner sought an evidentiary hearing in his 28 U.S.C. 2255 petition, said evidentiary hearing also to consist of proof of several acts of perjury of Mier before the jury, known to be perjured by the assistant United States Attorney.

The U.S. District Court denied in toto the 28 U.S.C. 2255 petition, see Appendix A, but upon application for a COA, granted that COA on a limited issue, not addressing the need for an evidentiary hearing to establish perjury of Mier and the suppression of the grant of immunity to Manuel Mier; See Appendix D to this petition.

Petitioner, relying on *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) and the Ninth Circuit case *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000) following the *Slack* mandate, fully briefed, in the merits briefs, all of the issues originally sought in the COA, but limited to but one issue as granted by the District Court.

The Ninth Circuit panel relied on an earlier case, *United States v. Zuno-Arce*, 209 F.3d 1095, 1099 (9th Cir. 2000) and its isolated Circuit Rule 22-1(d), to refuse to

examine the merit briefs to determine whether petitioner had made a "substantial showing of the denial of additional constitutional rights," and denied the 28 U.S.C. 2255 petition. See Appendix A to this petition.

Petitioner asserts that a gross conflict of procedural rules now exist in the 12 United States Circuit Court of Appeals whether a petitioner that has been granted a COA on one, or more, "limited issues," but denied on other key assertions of denials of constitutional rights, must first file a "motion" before a separate 2-judge motions panel, to augment the truncated granted COA, or whether the petitioner can set forth the claimed substantial issues in his briefs on the merits and the merits panel must examine these asserted additional denials of constitutional rights, and if established, sua sponte augment the COA and resolve those additional issues set forth in the briefs on the merits.

The United States Court of Appeals for the Ninth Circuit is in conflict with all other U.S. Circuit Courts save the First and Third (see Argument II infra), purporting to require a "motion" to a "motions panel," to augment the COA, and if that motion is not filed (as not required by this Court in *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)), the Ninth Circuit will then not examine the merits briefs for said additional "substantial showings of the denial of constitutional rights."

Petitioner asserts that this procedure violates the letter and spirit of *Slack v. McDaniel*, 529 U.S. 473, 483 III, and 28 U.S.C. 2253(c), and Certiorari should be granted to further explicate the petition for, and grant or denial of, a COA by a district court, and the subsequent

requirements of the Circuit Courts where, as here, a COA is granted as to partial issues.

ARGUMENT II

THERE IS A CONFLICT OF PROCEDURAL AUTHORITY BETWEEN THE FIRST, THIRD AND NINTH U.S. CIRCUITS AND ALL OF THE REMAINING 9 U.S. CIRCUITS IN THAT THE 1ST, 3RD AND 9TH CIRCUITS PURPORT TO REFUSE FULL EXAMINATION OF THE MERITS BRIEFS WHERE A COA IS GRANTED ON LIMITED ISSUES, UNLESS A "MOTION" IS FILED, AND IS GRANTED BY A 2-JUDGE "MOTIONS PANEL," AND WHERE THE PETITIONER HAS SET FORTH IN THE MERITS BRIEFS A "SUBSTANTIAL SHOWING OF THE DENIALS OF CONSTITUTIONAL RIGHTS"; THESE 3 CIRCUITS ABROGATE THE RIGHTS EXTENDED BY *SLACK V. MCDANIEL*, 529 U.S. 473, 483, III, (2000). THIS CONFLICT SHOULD REQUIRE THE GRANT OF CERTIORARI TO RESOLVE THIS CONFLICT AND RESULT IN THE RULING THAT THE 3 NAMED CIRCUITS VIOLATE THE LETTER AND SPIRIT OF *SLACK V. MCDANIEL*'S REQUIREMENT THAT THE MERITS PANEL EXAMINE THE BRIEFS FOR DENIALS OF ANY ADDITIONAL CONSTITUTIONAL RIGHTS.

Petitioner in Appendix E to this petition sets forth procedural rules extant in the 1st, 3rd and 9th Circuits that purport to require a petitioner seeking an augmented COA, beyond that partially granted by the District Court, to jump another hurdle before a 2-judge "motions panel," i.e. to attempt to convince such a panel that there has

been a "substantial showing of the denial of other constitutional rights" beyond the truncated COA granted by the District Court. None of the other Circuits have such rules (Source: Federal Rules of Appellate Procedure, 2001 Supplement).

It is asserted here that this Ninth Circuit Rule, apparently applied by some 3 judge panels of the Ninth Circuit (see *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000), citing and ruling in accord with *Slack v. McDaniel*, 529 U.S. 473, 483, III (2000)), but not others, as shown in the non-published order denying petitioner's 28 U.S.C. 2255 petition without confronting the other serious substantial showings of the denial of the constitutional rights to a full evidentiary hearing wherein the petitioner would establish that perjury occurred in this trial with the full knowledge of the assistant U.S. Attorney trying the case, and that a deal of immunity was accorded to key government witness Manuel Meir, and said deal was denied under oath by Mier before the jury, the prosecutor making no effort to change these lies. These constitutional right denials are established violations of such well-established authorities as *Napue v. Illinois*, 360 U.S. 264, 269 (1959) and *United States v. Agurs*, 427 U.S. 97, 103 (1976), and as to the suppression and falsification of a grant of immunity, *Giglio v. United States*, 405 U.S. 150 (1972) and *De Marco v. United States*, 415 U.S. 449 (1974). The failure to grant the evidentiary hearing violates the well-established rule recognized by the Ninth Circuit in *United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000):

> When a prisoner files a § 2255 motion, the district court must grant an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is

> entitled to no relief." 28 U.S.C. § 2255. Evidentiary hearings are particularly appropriate when "claims raise facts which occurred out of the courtroom and off the record." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *accord Frazer v. United States*, 18 F.3d 778, 781 (9th Cir. 1994); *Doganiere v. United States*, 914 F. 2d 165, 168 (9th Cir. 1990).

Based on *Solis v. Garcia*, 219 F.3d 922, 925-926 (9th Cir. 2000), another panel of the Ninth Circuit did not require an intermediate "motion" to a "motions panel," but embraced *Slack v. McDaniel*'s requirements that the merits panel examine the briefs filed on the merits to ascertain whether those briefs set forth a "substantial showing of the denial of other constitutional rights."

At 219 F.3d 922, 925:

> Solis sought a Certificate of Appealability ("COA") for all three issues he raised in the district court. The district court granted Solis a COA for a single question: whether the trial court's failure to instruct the jury on the elements of the predicate offense violated Solis' constitutional right to have a jury find upon proof beyond reasonable doubt every fact necessary for a conviction on second degree murder. Notwithstanding the district court's limited COA, Solis now asks this Court to review all three claims raised in his habeas petition.

And at 219 F.3d 922, 926:

> The Supreme Court recently decided that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-122,

> 100 Stat. 1214 ("AEDPA") regarding the issuance of a COA as a predicate to review in the court of appeals apply to all cases in which the notice of appeal was filed after the AEDPA's effective date, April 24, 1996. See *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000). Consistent with *Slack*, we treat petitioner's brief on uncertified issues in this appeal as a request to expand the COA issued by the district court. See Id. We conclude that petitioner has made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), with respect to all issues briefed to this court. We therefore grant the expanded COA and exercise jurisdiction over these issues on appeal.

As is shown in Appendix A to this petition, petitioner's panel refused to examine the briefs on the merits, thus rejecting both *Slack v. McDaniel* and *Solis v. Garcia*, supra.

It is here suggested that additional direction and guidance must emanate from this Honorable Court, and the foregoing conflict in the U.S. Circuit Courts now warrants the grant of Certiorari to the U.S. Ninth Circuit to resolve this conflict and apparent refusal to recognize *Slack v. McDaniel* and the subsequent Ninth Circuit adoption of its mandates in *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000).

Absent this grant of Certiorari, it is clear that the United States of America has achieved a criminal conviction by the knowing use of perjury and parallel violations of the commands of *Giglio v. United States*, 405 U.S. 150

(1972) and *De Marco v. United States*, 415 U.S. 449 (1974). The grant of Certiorari is therefore respectfully prayed for.

CONCLUSION

This Petition for Certiorari to the U.S. Court of Appeals for the Ninth Circuit must and should be granted to resolve a clear issue of national scope and consequence concerning the appeal of a criminal case and the grant of a Certificate of Appealability on partial issues, and what must follow thereafter; a conflict in the U.S. Circuit Courts exist, and a rule of national uniformity must be promulgated.

Dated: July 26, 2002

Respectfully submitted,

ROGER S. HANSON
Counsel to Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GORDON PAUL COOPER, Defendant-Appellant.	No. 01-55625 D.C. No. CV-00-02275-JNK **MEMORANDUM*** (Filed Mar. 11, 2002)

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted March 5, 2002**
Pasadena, California

Before: WARDLAW, W. FLETCHER, and FOGEL,***

Gordon Paul Cooper appeals the decision of the district court denying his petition for writ of habeas corpus. We

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* This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as 9th Cir. R. 36-3 may provide.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

*** Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

have jurisdiction under 28 U.S.C. § 1291, and we deny the petition.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2253, the scope of review in habeas appeals is limited to those issues specified in the certificate of appealability ("COA"). 28 U.S.C. § 2253 (c)(1)(B); *Hiivala v. Wood*, 195 F.3d 1098, 1102 (9th Cir. 1999). On April 6, 2001, the district court granted a COA solely as to Cooper's claim that his former counsel was ineffective for failing to uncover and disclose witness perjury. Cooper failed to file a timely motion for broader certification under Rule 22-1(d) and, therefore, we will not consider the uncertified issues. Ninth Cir. R. 22-1(d); *see United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000).

Cooper argues that his counsel was ineffective because he failed to seek an evidentiary hearing to investigate the possibility that perjured testimony was being used at trial. Cooper fails, however, to present any evidence that counsel had any information as to the alleged perjury that would have warranted investigation of this matter. Because counsel did not know of any facts that would warrant further inquiry, his performance was not deficient. *Strickland v. Washington*, 466 U.S. 668, 686, 690 (1984) (holding that deficient performance is determined by asking, "in light of all the circumstances," whether "the identified acts or omissions were outside the wide range of professionally competent assistance"). Nor does Cooper establish prejudice, because even if his counsel had used the allegedly perjured testimony to impeach the witness, there is no reasonable probability that the outcome of the trial would have been altered, because the perjured statements address a collateral matter. *See id.* at 694. When the overwhelming weight of the government's case

against Cooper is also considered, Cooper fails to demonstrate actual prejudice under the *Strickland* standard. *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (" 'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.' ") (citation omitted).

PETITION DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. GORDON PAUL COOPER, Defendant/Petitioner.	CASE NO. 00-CV-2275-K ORDER (Filed Feb. 5, 2001)

On November 14, 2000, Petitioner Gordon Paul Cooper, filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The Respondent, the United States of America ("the government") filed a response and opposition to this motion on December 15, 2000. Petitioner filed a traverse on January 17, 2001. Both sides are represented by counsel.

I. Background

On April 24, 1996, Petitioner was indicted with one count of conspiracy, in violation of 18 U.S.C. § 371; one count of Unlawful Disposal of Sewage Sludge, in violation of 33 U.S.C. §§ 1342 and 1319 (c)(2)(A) and 18 U.S.C. § 2; and three counts of mail fraud, in violation of 18 U.S.C. §§ 1342 and 2. On February 28, 1997, after a lengthy trial, the jury returned a verdict of guilty on all counts. On May 22, 1997, Petitioner was sentenced to a term of 36 months on Counts 1 and 2, to be served concurrently with a sentence of 51 months on counts 3-5.

The underlying facts in this case are extensive and fully recited in the Ninth Circuit opinion affirming this court's trial of Petitioner. *See United States v. Cooper*, 173 F.3d 1192 (9th Cir. 1999). That opinion is incorporated herein by reference.

The underlying facts involve Petitioner's involvement with the unlawful disposal of sewage sludge. Petitioner worked as the secretary and treasurer of Chino Corona Farms (CCF) in San Juan Capistrano, California. CCF transported, composted, and sold sewage sludge. In 1990, the City of San Diego awarded CCF a contract to remove sludge from Fiesta Island. CCF hauled this sludge to its own composting location until that location was overwhelmed by the volume of sludge. In 1992, CCF began hauling the sludge to Mexicali, Mexico. In 1993, after experiencing difficulties with the Mexican authorities, Petitioner decided to begin using California farmland to dispose of sewage without composting or treating the sludge. CCF misled the owners of the farmland by informing them that the sludge was safe and that CCF had a permit to transport and deposit the sludge. However, during this time, CCF was submitting falsified weighmaster certificates to the City of San Diego, which indicated that the sludge was still being deposited in Mexicali. Based on a tip from a trucking company involved, the City of San Diego began investigating the falsified certificates that CCF was submitting. The Federal Bureau of Investigation subsequently investigated CCF's office and discovered evidence of extensive fraud. Petitioner was subsequently indicted as the orchestrator of the operation.

One of the key witnesses against Petitioner was Manuel Mier, a Mexican citizen who was hired by

Petitioner to supervise operations in Mexicali. After an extensive direct and cross examination of Mier, in which his credibility was repeatedly questioned and impeached by Defense counsel, the prosecution put on the remainder of its case, and Petitioner was convicted by the jury on all counts. At sentencing, this court adopted the presentence report's recommendations and sentenced Petitioner to fifty-one months imprisonment.

Petitioner appealed his trial proceedings and his sentence to the Ninth Circuit on fourteen grounds of alleged error. These fourteen grounds argued before the Ninth Circuit included four issues that are involved in the six arguments made in the instant habeas petition, namely: (1) whether the district court erred in its rulings regarding the federal regulations relating to the disposal of municipal sewage sludge, found at 40 C.F.R. § 503; (2) whether the district court erred in sentencing Petitioner by an increased base offense level; (3) whether the government allowed perjured testimony in the grand jury or at trial; (4) whether the government failed to disclose an immunity agreement made with Mier and whether the government had failed to disclose to Petitioner crucial documentation of an interview conducted with Mier. The Court of Appeals affirmed this court's ruling on each of these grounds.

Petitioner appealed the Court of Appeals decision to the Supreme Court. The Supreme Court denied certiorari on November 29, 1999, in *Cooper v. United States*, 120 S.Ct. 526 (U.S. Nov. 29, 1999 (No. 99-315).

Petitioner filed his habeas motion on November 14, 2000. Petitioner alleges six grounds for habeas relief: (1) "the Supremacy Clause of the United States Constitution . . .

nullified any crime allegedly charged and/or committed by [Petitioner]"; (2) "The Supremacy Clause of the United States Constitution requires that the newly and subsequently enacted Federal law of 40 C.F.R. 503 taking effect on February 19, 1993, nullify the convictions obtained against me in Counts 1 and 2; (3) the government "allowed the knowing use of perjury via and through key prosecution witness Manuel Mier"; (4) the government "suppressed willfully from the defense counsel at trial that a deal had been made with key government witness Manuel Mier to not indict/prosecute him [federal crimes]"; (5) Petitioner "was denied the effective assistance of trial counsel guaranteed . . . under the Sixth Amendment . . . by [Petitioner's trial attorney's failure] to uncover perjury by government witnesses and allowance of that perjury [by the government]; and (6) Petitioner "was enhanced 10 points in the U.S.S.G. for the alleged 'theft' of over $500,000 from the City of San Diego. . . . This fact added several years to [Petitioner's] sentence, and was not raised by [Petitioner's trial counsel], a manifestation of ineffective assistance of counsel."

II. Discussion

The Ninth Circuit has held that matters that have been decided on direct appeal are inappropriate grounds for habeas relief. *See United States v. Scrivner*, 189 F.3d 825, 828 (9th Cir. 1999); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir.1972) ("The law in this circuit is clear that when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion.") Petitioner has presented six grounds for habeas relief. The government argues that the first

four grounds were specifically addressed in the Ninth Circuit's decision on Petitioner's appeal from his conviction. The government argues that accordingly these four issues are not properly included in this habeas motion. Petitioner has not denied that these issues were considered by the Ninth Circuit on direct appeal. Petitioner has also not provided any legal support for why this court has the authority to reconsider these issues that have been previously appealed to the Supreme Court. The court agrees that because these issues have been specifically ruled upon by the Ninth Circuit, and certiorari has been denied by the United States Supreme Court, these issues are inappropriately before this court on a habeas appeal.

Petitioner argues two grounds, however, that were not specifically addressed in the Ninth Circuit decision. Petitioner argues that his counsel provided ineffective assistance by not uncovering and revealing the government's use of perjured testimony, and Petitioner also alleges that his counsel was ineffective for not challenging his sentence based on the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because these two arguments were not raised on direct appeal, the court will now consider them.

A. Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the Supreme Court set out of two-pronged test for claims of ineffective assistance of counsel. Under the *Strickland* test, a petitioner must show that: (1) his counsel's representation fell below an objective standard of reasonableness; (2) there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy the first prong of the test petitioner must show that counsel's performance fell "outside the wide range of professional competence." *Strickland*, 466 U.S. at 687. Satisfaction of the second prong requires a showing that counsel's errors were so serious they deprived the petitioner "of a fair trial, a trial whose result is reliable." *Id.*

The *Strickland* test places a heavy burden on Petitioner, as "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The district court's review of counsel's performance is "highly deferential," and the court "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Hamilton*, 792 F.2d 837, 839 (9th Cir. 1986) (quoting *Strickland*, 466 U.S. at 689). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . . " *Strickland*, 466 U.S. at 690. If Petitioner makes an insufficient showing on one prong of the test, the court need not even ascertain if the other prong is met. *See Strickland*, 466 U.S. at 687.

1. Government's Use of Perjured Testimony

In the instant case, Petitioner argues that his counsel provided ineffective assistance by failing to uncover the government's use of perjured testimony and failing to prevent its use. The government argues that "there is no need to address that issue, because the area in which ineffectiveness is alleged (the failure to locate witnesses to impeach Mier . . .) would not have effected the outcome of the proceedings." Govt. Response at 15. The court agrees.

The second prong of the *Strickland* standard requires that "there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 686-87. The Petitioner here is arguing that his counsel should have uncovered the FBI report on Mier and prevented the use of Mr. Mier's perjured testimony by the government. However, the Ninth Circuit specifically considered the government's use of Mier's testimony when it considered Petitioner's request for an evidentiary hearing on the issue. The Ninth Circuit held that: "Remand for an evidentiary hearing on disclosure is unnecessary . . . because the FBI report was not material. The defense was able to impeach Mier extensively. The defense established both through cross-examining Mier and through direct examination of [other witnesses] that Mier gave conflicting versions of events to FBI agents, to the grand jury, and at trial." *Cooper*, 173 at 1203. Additionally, on the issue of the government's use of the perjured testimony, the court held "even if we assume that Mier committed perjury and the government knew of it, the prejudice to [Petitioner] was not great, [Petitioner's] attorney was able to

impeach Mier extensively with inconsistent statements." *Id.* Accordingly, Petitioner cannot show that "but for" his counsel's error, the result of the proceeding would have been different.

Petitioner argues that his counsel was ineffective for failing to prevent the use of Mier's testimony by the government. It is not clear what pre-trial motion would have prevented the witness from testifying, but assuming there is one, Petitioner cannot show that the use of the evidence affected the outcome of his trial. In fact, the Ninth Circuit specifically stated that: "There was ample evidence of [Petitioner's] guilt even without Mier's testimony. Given the already extensive impeachment of Mier and the independent evidence of Cooper's guilt, we conclude that the FBI report does not 'put the whole case in such a different light as to undermine confidence in the verdict.' **The government's case did not rise or fall on Mier's credibility.**" *Cooper* 173 F.3d at 1203 (citations omitted, emphasis added).

Because Petitioner cannot demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 U.S. at 686-87), Petitioner's ineffective assistance of counsel claim based on his counsel's failure to prevent the introduction of perjured testimony into evidence is DENIED.

2. Petitioner's Sentence Enhancement

In his sixth and final ground for habeas relief, Petitioner argues that his sentence "was enhanced 10 points in the U.S.S.G. for the alleged 'theft' of over $500,000 from the City of San Diego. . . . This fact added

several years to [Petitioner's] sentence, and was not raised by [Petitioner's trial counsel], a manifestation of ineffective assistance of counsel." Pet. at 21. The court is unclear as to what this ground is exactly arguing, because Petitioner's counsel raised objections to the sentence enhancements both at sentencing and in subsequent appeals. The court will accordingly construe this argument as an attack on counsel's performance for his failure to use *Apprendi* to contest the sentence enhancement.

The government argues that *Apprendi* does not provide a basis for relief in Petitioner's case, because Petitioner's sentence of 51 months was less than the 60 months which is the statutory maximum for mail fraud. The court agrees. The government also cites to the Ninth Circuit decision in *Jones v. Smith*, 231 F.3d 1227 (9th Cir.2000), to support its argument that the rule in *Apprendi* may not be retroactively applied to the sentencing that occurred in this case. *See Jones*, 231 F.3d at 1235 ("We need not decide the question of whether Petitioner's conviction comports with Apprendi, however, because we find that the non-retroactivity principle pronounced in *Teague v. Lane*, [citation omitted], prevent Petitioner from benefitting from Apprendi's new rule on collateral review.")

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Ninth Circuit applied in Apprendi rule in *United States v. Nordby*, 225 F.3d 1053 (9th Cir.2000). In *Nordby*, the Ninth Circuit

vacated the sentence of a defendant convicted of conspiracy and possession of marijuana with intent to distribute pursuant to 21 U.S.C. §841(b)(1). The jury had made no finding as to the quantity of marijuana plants grown by the defendant, but at sentencing the district court judge determined that the defendant had over 1000 plants. This subjected the defendant to a mandatory minimum sentence of ten years and a statutory maximum sentence of life imprisonment. A finding of a lesser quantity would have carried only a five year statutory maximum. The Ninth Circuit determined that this violated defendant's rights under *Apprendi* because the judge's determination of the quantity of plants had increased the applicable statutory maximum, and sent the case back to the district court judge for resentencing.

In the instant case, Petitioner does not deny that his sentence of 51 months is within the applicable statutory maximum of 60 months. Petitioner argues, however, that the court should apply *Apprendi* to the sentencing guidelines. The Ninth Circuit recently held that *Apprendi* has no application where the sentence given is within the statutory maximum for the charge. *See United States v. Garcia-Sanchez*, 2001 Daily Journal D.A.R. 799, No. 00-30125 (9th Cir. January 23, 2001). Therefore *Apprendi* is inapplicable to Petitioner's case.

Because the rule in *Apprendi* is inapplicable to Petitioner, the court need not address the government's argument that *Apprendi* may not be retroactively applied. Additionally, because *Apprendi* is not applicable to this case, Petitioner's argument that his counsel was ineffective for failing to contest his sentence under *Apprendi* must fail. Accordingly, Petitioner's sixth and

final ground for habeas relief from his sentence is DENIED.

III. Conclusion

For the foregoing reasons, the court DENIES Petitioner's petition for writ of habeas corpus.

IT IS SO ORDERED.

2/01/03
DATE

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

CC: ALL PARTIES

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff/Respondent, vs. GORDON PAUL COOPER, Defendant/Petitioner.	CASE NO 00-CV-2275-K 96-CR-804-K ORDER GRANTING PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY (Filed Apr. 6, 2001)

On February 5, 2001, this court denied Petitioner's application for writ of habeas corpus pursuant to 28 U.S.C. § 2255. On April 3, 2000, Petitioner, a federal prisoner proceeding pro se, filed this request for a certificate of appealability. Before Petitioner can appeal the dismissal, this court must issue a certificate of appealability ("COA"). *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2253.

I. Legal Standard

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that a "certificate of appealability" shall issue "only if the applicant has made a substantial showing of a denial of a constitutional right." *See* AEDPA at § 102, 110 Stat. 1217-18 (emphasis added).

Section 2253 provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complaint of arises out of a process issued by a State court; or (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). 28 U.S.C. § 2253.

Section 2253 therefore permits a COA to issue where the applicant has made a "substantial showing of the denial of a constitutional right." This standard is a "modest" one; the petitioner need only "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983)). A court should issue a COA to appeal a district court's procedural ruling where "the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000).

II. Discussion

Given the court's previous order of February 5, 2001, incorporated herein by reference, there is no need to reiterate the facts regarding Petitioner's criminal acts. While Petitioner seeks a COA on several of the decisions made in the Ninth Circuit's consideration on direct appeal of this case, those issues have already been appealed to the Supreme Court. The Supreme Court denied certiorari on November 29, 1999, in *Cooper v. United States*, 120 S.Ct. 526 (U.S. Nov. 29, 1999 (No. 99-315). Additionally, Petitioner appears to raise new claims in this application for COA. However *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000), clearly holds that a court should issue a COA only as to questions considered in the underlying petition. Accordingly, the only issues this COA will address are the two claims for ineffective assistance of counsel initially made in Petitioner's habeas petition before this court. The Petitioner is seeking a certificate of appealability on the question of whether his trial counsel was ineffective by not uncovering and revealing the government's use of perjured testimony and for not challenging his sentence based on the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In this court's denial of Petitioner's habeas petition, the court extensively discussed the reasons Petitioner could not satisfy the standard for ineffective assistance of counsel. The court notes, however, that Petitioner's argument that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), could cause jurists of reason to question whether the district court was correct in its procedural ruling against Petitioner's habeas petition.

Slack v. McDaniel, 120 S.Ct. 1595, 1604 (2000). Accordingly, the court grants Petitioner's application for a COA on this issue of ineffective assistance of counsel.

Petitioner also argues that his counsel was ineffective for failing to challenge his sentence under *Apprendi v. New Jersey*, 560 U.S. 430 (2000). As the court explained in its order denying habeas relief, the Ninth Circuit recently held that *Apprendi* has no application where the sentence given is within the statutory maximum for the charge. *See United States v. Garcia-Sanchez*, 2001 Daily Journal D.A.R. 799, No. 00-30125 (9th Cir. January 23, 2001). Petitioner does not deny that his sentence of 51 months is within the applicable statutory maximum of 60 months. Therefore *Apprendi* is inapplicable to Petitioner's application for a COA on this issue is denied.

IV. Conclusion

For the foregoing reasons, this court **GRANTS** Petitioner's request for a certificate of appealability as to his claim that his counsel was ineffective for failing to uncover and disclose witness perjury. The court DENIED Petitioner's application for a COA on the issue of counsel's failure to raise *Apprendi* at sentencing.

IT IS SO ORDERED.

4/08/01
Date

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

CC: ALL COUNSEL AND/OR PARTIES

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GORDON PAUL COOPER, Defendant-Appellant.	No. 01-55625 96-CR-804-K D.C. No. CV-00-02275-JNK Southern District of California, San Diego **ORDER** (Filed May 1, 2002)

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Submitted March 5, 2002
Pasadena, California

Before: WARDLAW and W. FLETCHER, Circuit Judges and FOGEL,* District Judge.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

* Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

Rules outside and beyond the requirements of 28 U.S.C. 2253(c). No other Circuits have these rules save the First, Third, and Ninth Circuits.

Source: Federal Rules of Appellate Procedure, 2001 Supplement

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT RULE 22.1

(c) Partial Denial by District Court:

(1) If the district court grants a certificate of appealability as to one or more issues, the petitioner's appeal shall go forward only as to the issue or issues for which the district court granted the certificate. *See Grant – Chase v. Commissioner*, 145 F.3d 431 (1st Cir. 1998).

(2) If the petitioner wants appellate review of an issue or issues as to which the district court has denied a certificate of appealability, petitioner must apply promptly, within the time set by the clerk of the court of appeals, to the court of appeals for an expanded certificate of appealability. The request for an expanded certificate of appealability:

(A) must be explicit as to the additional issues the petitioner wishes the court to consider and

(B) should be accompanied by a copy of the district court order and a memorandum giving specific and substantial reasons, and not mere generalizations, why an expanded certificate of appealability should be granted.

If the petitioner fails to apply for an expanded certificate of appealability within the time designated by

the clerk, the appeal will proceed only with respect to the issues on which the district court has granted a certificate; this court will not treat an inexplicit notice of appeal, without more, as a request for a certificate of appealability with respect to issues on which the district court has denied a certificate.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT RULE 22.0

(b) If the district court grants a certificate of appealability as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants certification of additional issues. Petitioners desiring certification of additional issues must file, in the court of appeals, a separate motion for additional certification, along with a statement of the reasons why a certificate should be granted as to any issue(s) within 21 days of the docketing of the appeal in the Court of Appeals. Respondents may file a memorandum in opposition within 14 days of service of the application. Petitioner's reply, if any, must be filed within 10 days of the service of the response. The length and form of any application, response, or reply, must conform to the requirements of Rule 27, Fed. R. App. Pro. governing motions. The order of the motions panel must be attached to the brief. If the motions panel denies the motion to certify additional issues, the parties may brief only the issues certified. The merits panel may direct briefing of any additional issues it wishes to consider.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT RULE 22-1

> (d) Partial Denial by District Court; Motion by Petitioner. If the district court denies a certificate of appealability in part, the court on appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issue(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

It would appear that an additional conflict exists between the Third Circuit, which still allows "The merits panel to direct briefing of any additional issues it wishes to consider", i.e., from examination of the briefs, and the First and Ninth Circuits which purport to disallow ANY further consideration by the merits panel since these Circuits refuse to allow briefing on matters denied by the "Motions Panels" of the First and Ninth Circuits. This distinction is set forth in the bodies of the above rules drawn from the First, Third, and Ninth Circuits.

Supreme Court, U.S.
FILED
NOV 1 2002
OFFICE OF THE CLERK

No. 02-145

In the Supreme Court of the United States

GORDON P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

KARIN B. HOPPMANN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, when reviewing the denial of petitioner's motion under 28 U.S.C. 2255, the court of appeals had authority to decline consideration of issues not included in the certificate of appealability issued by the district court, because petitioner did not move for an expanded certificate as required by local rule.

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In the Supreme Court of the United States

No. 02-145

GORDON P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the *Federal Reporter*, but is reprinted in 31 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2002. A petition for rehearing was denied on May 1, 2002 (Pet. App. D1-D2). The petition for writ of certiorari was filed on July 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner

was convicted of conspiracy, in violation of 18 U.S.C. 371; unlawful disposal of sewage sludge, in violation of 33 U.S.C. 1342 and 1319(c)(2)(A); and mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 51 months of imprisonment. The court of appeals affirmed his convictions and sentence, *United States* v. *Cooper*, 173 F.3d 1192 (3d Cir. 1999), and this Court denied certiorari, 528 U.S. 1019 (1999). Petitioner then filed a motion under 28 U.S.C. 2255 to vacate his sentence. The district court denied the motion (Pet. App. B1-B11) and issued a certificate of appealability (COA) for only one of petitioner's several claims (Pet. App. C1-C4). The court of appeals, limiting the scope of review to the issue included in the COA, affirmed the denial of the Section 2255 motion. Pet. App. A1-A3.

1. Petitioner orchestrated the illegal dumping of untreated sewer sludge in southern California. As the officer of a sewage disposal firm that contracted with the city of San Diego, petitioner arranged for the disposal of the city's sewage sludge. The firm originally arranged to haul the sludge to a treatment site for safe compost, but the site became overwhelmed. Petitioner then instructed employees to haul the sludge to Mexico, outside the city's jurisdiction. When Mexican authorities detained the sludge trucks, petitioner directed the dumping of the sludge, under cover of night, on a California farm. Petitioner falsely informed the farm's owner that the dumping was authorized by permit. He also caused the submission of false "weighmaster" certificates indicating that the sludge was still going to Mexico. 173 F.3d at 1196-1198.

A grand jury indicted petitioner for conspiracy to violate the laws of the United States (18 U.S.C. 371), unlawful disposal of sewage sludge (33 U.S.C. 1319(c)(2)(A) and 1342), and mail fraud (18 U.S.C. 1341).

After a jury trial, petitioner was convicted of all the charges and sentenced to 51 months of imprisonment. 173 F.3d at 1200. The court of appeals affirmed his convictions and sentence, *id.* at 1196, and this Court denied his petition for certiorari, 528 U.S. 1019.

2. In November 2000, petitioner filed a motion under 28 U.S.C. 2255 that raised numerous challenges to his convictions and sentence. The district court denied the motion. Pet. App. B1-B11.[1]

Petitioner then filed a motion in the district court requesting a COA authorizing appeal. See 28 U.S.C. 2253(c)(1) ("Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from—* * * the final order in a proceeding under section 2255."). The district court granted a COA limited to one of petitioner's issues: whether his Sixth Amendment rights were violated when his counsel failed to uncover alleged perjury committed at trial. See 28 U.S.C. 2253(c)(3) ("The certificate * * * shall indicate which specific issue or issues satisfy the showing required."). Pet. App. C3. Petitioner filed a notice of appeal from the district court's denial of his motion. He then attempted to raise in the court of appeals claims that the district court had not included in the COA. See Pet. App. A2.

3. In an unpublished memorandum opinion, the court of appeals affirmed the district court's denial of

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[1] The district court refused to entertain most of petitioner's claims because petitioner had already unsuccessfully raised the claims on direct appeal. The court did, however, evaluate two of the claims: that petitioner had received ineffective assistance when his counsel failed to uncover the government's alleged use of perjured testimony at trial, and that he had received ineffective assistance when his counsel failed to challenge a sentence enhancement. Pet. App. B5.

petitioner's Section 2255 motion. Pet. App. A1-A3. The court of appeals limited the scope of its review to the Sixth Amendment issue included in the COA. Pet. App. A2. The court explained that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2261 *et seq.*, review of the denial of a motion under 28 U.S.C. 2255 is limited to those issues specified in a COA. Pet. App. A2 (citing 28 U.S.C. 2253(c)). The court observed that petitioner had not filed a motion in the court of appeals requesting certification of additional issues beyond those included in the COA granted by the district court. The court explained that such a motion is required by Ninth Circuit Rule 22-1(d). That rule provides as follows:

> If the district court denies a [COA] in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a [COA]. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

9th Cir. R. 22-1(d); see Pet. App. E3. Because petitioner failed to file a request to expand the COA within

35 days of the district court order granting the limited COA, the court of appeals declined to consider the additional issues that petitioner had briefed. Pet. App. A2.

Addressing the issue on which petitioner had obtained a COA, the court of appeals affirmed the district court's ruling that petitioner's Sixth Amendment rights were not violated. Pet. App. A2-A3. The court of appeals held that petitioner had not shown that his counsel performed deficiently in failing to uncover the alleged perjury at trial because petitioner had not established that counsel knew of any facts that would have warranted further inquiry into the alleged perjury. See Pet. App. A2 (citing *Strickland* v. *Washington*, 466 U.S. 668, 686, 690 (1984)). The court further held that petitioner had not shown prejudice from counsel's actions because there was no reasonable probability that the outcome of the trial would have been different if counsel had impeached the witness with the alleged perjured testimony. Pet. App. A2-A3.

ARGUMENT

Petitioner contends that the court of appeals was required to consider whether to expand the COA granted by the district court to encompass his additional claims despite his failure to move for an expanded COA within the time limit established by Ninth Circuit Rule 22-1. That issue does not warrant this Court's review.

Under 28 U.S.C. 2253(c), a federal prisoner must obtain a COA from the district court or the court of appeals before he may appeal the district court's denial of collateral relief under 28 U.S.C. 2255. Section 2253(c)(1) provides that "an appeal may not be taken" from "the final order in a proceeding under Section

2255" "[u]nless a circuit justice or judge" issues a COA. 28 U.S.C. 2253(c)(1). Section 2253(c)(2) further provides that a COA may issue only if the prisoner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Section 2253(c)(3) requires that any COA "indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. 2253(c)(3).

Federal Rule of Appellate Procedure 22(b)(1) also provides that a Section 2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA]." Fed. R. App. P. 22(b)(1). The rule indicates that the COA process begins in the district court, but, if the district court does not issue a COA, the movant may request a COA from the court of appeals:

> If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a [COA] or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

Fed. R. App. P. 22(b)(1). In addition, Rule 22(b)(2) provides:

> A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

Fed. R. App. P. 22(b)(2).

Because of Section 2253(c)(3)'s requirement that a COA "indicate which specific issue or issues" meet the standard for appealability in Section 2253(c)(2), COAs are "granted on an issue-by-issue basis." *Lackey* v. *Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). The scope of review on appeal is limited to the issues specified in the COA. *Ibid.*; *Valverde* v. *Stinson*, 224 F.3d 129, 136 (2d Cir. 2000); *Bui* v. *Dipaolo*, 170 F.3d 232, 237 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000); *Hiivala* v. *Wood*, 195 F.3d 1098, 1102-1103 (9th Cir. 1999), cert. denied, 529 U.S. 1009 (2000); *Sylvester* v. *Hanks*, 140 F.3d 713, 715 (7th Cir. 1998); *Ramsey* v. *Bowersox*, 149 F.3d 749, 759 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999); *Murray* v. *United States*, 145 F.3d 1249, 1251 (11th Cir. 1998); *In re Certificates of Appealability*, 106 F.3d 1306, 1308 (6th Cir. 1997).

If the district court declines to issue any COA at all and the Section 2255 movant fails to make an express request to a circuit judge for a COA, the plain language of Federal Rule of Appellate Procedure 22(b) provides that a notice of appeal constitutes a request to the court of appeals for a COA as to all issues raised in the Section 2255 motion. Fed. R. App. P. 22(b)(1) & (2); *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000); *Bui*, 170 F.3d at 237. Rule 22(b), however, does not expressly address whether a notice of appeal serves as a request to the court of appeals to expand a COA granted by the district court to cover issues that the district court declined to certify. The courts of appeals have taken differing views on the answer to that question. See *Jones* v. *United States*, 224 F.3d 1251, 1256 (11th Cir. 2000) (noting different approaches and declining to decide the issue).

The Sixth, Seventh, and Tenth Circuits have chosen to treat a notice of appeal as a constructive request to review the district court's partial denial of certification. See *Ross* v. *Ward*, 165 F.3d 793, 797 (10th Cir.), cert. denied, 528 U.S. 887 (1999); *Kincade* v. *Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *Porter* v. *Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997), cert. denied, 522 U.S. 1093 (1998). Other courts of appeals have declined to do so and instead require a specific request in the court of appeals to expand the certificate. See *Bui*, 170 F.3d at 237 (1st Cir.); *United States* v. *Kimler*, 150 F.3d 429, 430 (5th Cir. 1998); *United States* v. *Zuno-Arce*, 209 F.3d 1095, 1099-1101 (9th Cir. 2000); 3d Cir. R. 22.1(b). Three of those circuits have adopted local rules that specify the procedure that a Section 2255 movant who has been granted a limited COA should follow in order to request an expanded COA from the court of appeals. See 1st Cir. R. 22.1(c);[2] 3d Cir. R. 22.1(b);[3] 9th Cir.

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[2] In the First Circuit, after the district court's partial denial of a COA, the "petitioner must apply promptly, within the time set by the clerk of the court of appeals, to the court of appeals for an expanded [COA]." 1st Cir. R. 22.1(c) (reproduced at Pet. App. E1-E2). The circuit rule further specifies:

> If the petitioner fails to apply for an expanded [COA] within the time designated by the clerk, the appeal will proceed only with respect to the issues on which the district court has granted a certificate; this court will not treat an inexplicit notice of appeal, without more, as a request for a [COA] with respect to issues on which the district court has denied a certificate.

Ibid.

[3] The Third Circuit's rule provides:

> If the district court grants a [COA] as to only some issues, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants,

R. 22-1(d).[4] The court of appeals in this case followed the Ninth Circuit's local rule and declined consideration of issues outside the district court's COA.

Petitioner contends (Pet. 8, 12, 13-17) that this Court's review is necessary to establish a uniform procedure to be followed by all the courts of appeals. There is, however, no need for plenary review by this Court in order to establish a uniform procedure. The courts of appeals have supervisory authority to structure discretionary procedures to govern appellate

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certification of additional issues. Petitioners desiring certification of additional issues must file, in the court of appeals, a separate motion for additional certification, along with a statement of the reasons why a certificate should be granted as to any issue(s) within 21 days of the docketing of the appeal in the court of appeals. * * * If the motions panel denies the motion to certify additional issues, the parties may brief only the issues certified. The merits panel may direct briefing of any additional issues it wishes to consider.

3d Cir. R. 22.1(b) (reproduced at Pet. App. E2).

[4] As noted above, the Ninth Circuit's rule provides:

If the district court denies a [COA] in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a [COA]. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

9th Cir. R. 22-1(d) (reproduced at Pet. App. E4).

practice within their jurisdictions. See *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). The existence of different rules of procedure in different circuits does not pose a problem, because litigants, attorneys, and district courts within each circuit can ascertain the applicable local rule and adhere to it. Ninth Circuit Rule 22-1 clearly provides that a Section 2255 movant who has received only a partial COA from the district court is required to move the court of appeals for an expanded COA. That rule was promulgated on January 1, 1999. See *United States* v. *Christakis*, 238 F.3d 1164, 1168 n.5 (9th Cir. 2001). The district court ruled on petitioner's request for a COA on April 26, 2001, nearly two and one-half years after the promulgation of the rule. There is therefore no unfairness in holding petitioner to the rule.

Furthermore, the difference in approach among the courts of appeals is more a matter of form than substance. Petitioner cites no case, and we are aware of none, in which a court of appeals has held that it lacks the *power* to expand on its own initiative the issues that it will consider on appeal when the Section 2255 movant has filed a general notice of appeal and briefed uncertified issues. Indeed, the Third Circuit's local rule requiring a movant who seeks broader certification "to file a motion within 21 days of docketing the appeal" explicitly provides that "[t]he merits panel may direct briefing of any additional issues it wishes to consider." 3d Cir. R. 22.1(b). And the First and Ninth Circuit rules do not preclude a merits panel from exercising its discretion to grant an expanded COA in order to consider an issue that it deems worthy of appellate review. Therefore, the different procedural approaches of the courts of appeals are unlikely to affect the outcome of many cases. In the event that the difference in ap-

proach were to become problematic or unfair, the appropriate response would be amendment of the Federal Rules of Appellate Procedure to address the issue, rather than resolution of the issue by this Court in the exercise of its certiorari authority.

Petitioner also errs in contending (Pet. 8, 11, 12-13) that the court of appeals' requirement that he move for an expanded certificate conflicts with this Court's decision in *Slack* v. *McDaniel*, 529 U.S. 473 (2000). Petitioner's contention rests on a misinterpretation of *Slack*.

The petitioner in *Slack* sought review of a habeas petition that he had filed in district court before the effective date of the AEDPA but had appealed after that date. See 529 U.S. at 481-482. The district court had treated his notice of appeal as a request for a certificate of probable cause (CPC), the pre-AEDPA precursor to a COA, and had denied the CPC. The court of appeals had likewise denied a CPC. See *id.* at 480. This Court held that the COA requirement of the AEDPA, rather than the pre-AEDPA CPC requirement, applied because the petitioner had filed his notice of appeal after the AEDPA's effective date. *Id.* at 478, 482. The Court then stated that, because the petitioner had not requested a COA, the court of appeals "should have treated [petitioner's] notice of appeal as an application for a COA" under Federal Rule of Appellate Procedure 22(b). 529 U.S. at 483. The Court thereafter addressed the standard that the court of appeals should have applied to determine whether the petitioner was entitled to a COA. *Id.* at 483-490.

Petitioner argues that *Slack* requires a court of appeals to treat a notice of appeal as a request for an expanded COA when the district court has granted only a limited COA. The Court in *Slack*, however, had no

occasion to address that question. As noted above, the petitioner in *Slack* had not filed a request for a certificate, and both the district court and the court of appeals had denied him a certificate on any issue. This Court's discussion therefore dealt solely with the procedure when "no express request for a certificate is filed," a situation addressed directly by Federal Rule of Appellate Procedure 22(b)(2). The Court did not discuss the situation that is presented by this case and is not addressed by Rule 22(b)—when the petitioner has requested and received a COA, but the COA is limited to certain issues.

Petitioner also claims (Pet. 6-7, 14-16) that the Ninth Circuit's decision here conflicts with its decision in *Solis* v. *Garcia*, 219 F.3d 922 (2000), cert. denied, 122 S. Ct. 94 (2001). Any conflict between those two decisions should be resolved by the court of appeals rather than this Court. See *United States* v. *Wisniewski*, 353 U.S. 901 (1957) (per curiam). In any event, there is no conflict.

The court in *Solis* did treat the petitioner's brief, which addressed issues beyond the scope of the COA that he had received from the district court, as a request to expand the COA. See 219 F.3d at 926. The court did not, however, discuss Rule 22-1. Moreover, the district court in *Solis* had granted the limited COA more than 35 days before the effective date of Rule 22-1, so it was not practicable for the petitioner to comply with the rule. See *United States* v. *Zuno-Arce*, 245 F.3d 1108, 1109 & n.2 (9th Cir. 2001) (Browning, C.J., dissenting). *Solis* is thus merely an implicit decision not to apply Rule 22-1 to an appeal initiated before its effective date. See *ibid.* As noted above, petitioner's appeal was initiated more than two years after Rule 22-1's effective date. *Solis* is therefore inapposite. See *Christakis*, 238 F.3d at 1168 n.5 ("The district court

granted Christakis's partial COA on February 23, 1999, almost two months after the effective date of Circuit Rule 22-1. Christakis failed to file a motion to broaden the certificate within 35 days, so this appeal should be confined to the sole issue [contained in the COA].").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

KARIN B. HOPPMANN
Attorney

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